YEO AH SENG v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J.) January 9, 1967]

[K.L. — Federal Court Criminal Appeal No. X.31 of 1966]

Penal Code, s 302 — Murder — Defence of insanity — Intoxication leading to insanity — Medical evidence unchallenged but depracated by trial judge — Lack of motive for killings as indication of insanity — Presumption that "every man intends the natural and probable consequences of his act" — Maxim should be avoided in dealing with question of intention in murder trials.

This was an appeal against the conviction of the appellant for murder. The main grounds of appeal were (1) that the learned judge failed to direct the jury adequately or properly on the question of insanity, (2) that the learned trial judge failed to direct the jury's attention to the fact that lack of motive was an indication of insanity and were not told that the appellant and the deceased were on friendly terms with one another, (3) that the learned trial judge was wrong in emphasizing to the jury the *maxim* that "every man is presumed to intend the natural and probable consequences of his act."

Held: (1) as there was uncontradicted medical evidence of insanity in this case the jury should have been directed that the expert evidence in this case was not challenged in any way on the question of insanity; the learned trial judge should not have deprecated the evidence of the medical-expert and directed that the expert's views were based on assumptions;

(2) although motive is not important in the offence of murder, the jury's attention should have been drawn to the fact that the lack of motive was an important indication of insanity and the jury should have been told that the deceased and the appellant were on friendly terms with one another;

(3) judges should avoid using the *maxim* that "every man is presumed to intend the natural and probable consequences of his act," in their summings up to the jury when dealing with the question of intention in murder trials.

Cases referred to:—

(1) *Jusoh* v. *Public Prosecutor* [1963] M.L.J. 84, 86.

(2) *R.* v. *Rivett* (1950), 34 Cr.App.R. 87.

(3) *Hurpurshad* v. *Sheo Dyal* (1875-6), 3 I.A. 259.

(4) *Loh Moh* v. *Public Prosecutor* [1954] M.L.J. 14.

(5) *Director of Public Prosecutions* v. *Smith* [1960] 3 All E.R. 161; [1961] A.C. 290; 44 Cr.App.R. 261.

(6) *Parker* v. *The Queen* (1963-4), 37 A.L.J.R. 3, 11.

(7) *Stapleton* v. *The Queen* (1952), 86 C.L.R. 358, 365.

FEDERAL COURT.

Dato' David Marshall (*Miss Kamala Devi* with him) for the appellant.

Abu Talib bin Othman (Deputy Public Prosecutor) for the respondent.

Barakbah L.P.: The appellant was convicted on three charges of murder by a judge of the High Court sitting at Malacca. The deceased persons were Seet Jok Chong alias See Geok Chiew alias Itam, taxi driver, Maniam son of Palani, detective corporal and Retnam son of Selvadurai, detective sergeant. He was sentenced to death on the first charge, the sentences on the remaining charges being stayed. He appealed against the convictions. The appeal was heard on 1st November, 1966, and it was allowed. We intimated that we would give our grounds of judgment later and we now do so.

The shooting incident occurred near the vacinity of Kuang Heng Bar and restaurant, Alor Gajah, a short while after a fight had taken place inside the said restaurant. The facts of the case may be summarised as follows. On 18th October, 1965, at about 7 p.m. the appellant entered the said restaurant and sat at a table marked "O" in exhibit P.30. Half an hour later Abu Samah, P.W.10, came in and sat at the table marked "L". At about 8 p.m. the deceased Itam came and sat at P.W.10's table. Then deceased Retnam came in and also sat at P.W.10's table. None of them spoke to the appellant who left the Bar at about 9 p.m. A short while later he returned to the Bar and went to compartment marked "M". He had drinks with friends including some teachers. The appellant and the teachers left the shop at about 10.15 p.m. by the side entrance. P.W.9 was one of the teachers. P.W.10 and the two deceased Itam and Retnam were still seated at table marked "L" when appellant left with the teachers. About 15 minutes later the appellant returned to the Bar again alone. He came in by the side entrance. The three persons were still seated at table "L". When the appellant entered he challenged Retnam the deceased to a fight. There was a fight between them. Both fought with their fists. P.W.10 stood up and separated them. Eventually with the assistance of the proprietor of the Bar and his wife and P.W.8 they succeeded in taking the accused out of the restaurant. Then Itam and P.W.10 left the restaurant. They went to a tree and sat down on the long wooden bench under it. About 20 minutes later Retnam came and sat on the same bench. After that one Ee Kwee Sum came. Not long afterwards the appellant came to the place and stood near the tree. The appellant said: "Mahu challengekah?" Retnam stood up and moved away towards the public road. After Retnam had moved two or three steps away the appellant took out his revolver from his pocket and shot him. Itam was still seated and so was P.W.10. Ee Kwee Sum had already left. P.W.11, an ice-seller who had been there before Itam and P.W.10 arrived, heard three shots and after hearing the second shot and seeing P.W.10 running away he also ran. Retnam was just crossing the drain when the first shot was fired. Ee Kwee Sum, P.W.12, moved away as soon as the appellant came to the place.

The appellant then went to the deceased Maniam's barracks. Maniam, his wife (P.W.14) and their two children were in making preparations for returning to Johore Bahru for

Deepavali. P.W.14 then heard a voice saying: "Maniam, ada satu case, mari." It came from the back of the house. It was the voice of the appellant. Maniam and P.W.14 went to the back door. Maniam opened the door and asked: "Apa case?" P.W.14 was by his side. As soon as Maniam uttered "apa case" the appellant shot him with a revolver. Maniam then uttered: "Ayoh, ayoh!" and said: "Ah Seng has shot me." P.W.14 then shouted for help but no one came. Then she saw the appellant coming from her left. Her children were by her side. He came and sat in front of his house saying: 'India sudah kalah, China sudah menang." He then said: "Maniam, lu sudah si," "saya mahu tembak lu punya anak." When he said that he had his revolver in his hand. So saying he took out bullets from his pocket and loaded his revolver. When he was loading his revolver she rushed up to him, held his jaw and begged him not to shoot her children. As he looked at her face he broke open his revolver. She placed her thumb between the butt and the barrel and closed the chambers with her palm. They were struggling with the revolver and the bullets from the chambers fell into her palm. Then she ran back to her house and the appellant turned towards the garage. With the assistance of her two children she managed to get her husband into the barracks.

Appellant's defence was that of insanity. He had two motor-cycle accidents in 1959 and 1962 and on both occasions he was taken to hospital unconscious. During the past one or two years he had been suffering from headaches every now and again. He visited the medical dresser at Alor Gajah in connection with his complaint of headaches. About 20 days before 18th October, 1965, the date of this incident, he visited Malacca General Hospital and was examined by a medical officer. He complained of headaches and failing eyesight. The doctor gave him some medicine. On 18th October, 1965, he felt a severe headache. He decided to take some brandy with the hope that it would make him perspire thereby relieving him of the headache. He had frequently gone to Kuang Heng Bar during his stay in Alor Gajah. Normally he consumed between one to two pegs of brandy. On the evening in question he went to the bar to drink brandy. He had two pegs. Then Ah Toong Peh came to the Bar and bought a bottle of brandy. He had a short conversation with him. Ah Toong Peh opened the bottle of brandy and wanted to pour some brandy into his glass. He stopped him telling him that he had taken sufficient brandy that evening. He also told him that he could not drink a lot because of his constant headaches. Ah Toong Peh insisted on his having some drinks with him and he poured some brandy into his glass. Ah Toong Peh forced him to drink and he did so. Then Ah Toong Peh left the restaurant. After that the *penghulu* entered the shop. He invited the *penghulu* to join him and they had some drinks together. Then the *penghulu* left and he remained there and kept on drinking. According to P.W.8 appellant had about 12 stengahs of brandy when he was in the restaurant. Later he got up and walked about the shop. He seemed to hear the sound "k-i-i-ng" in his ear and his eyesight was blurred but he could see Retnam sitting at the table. He seemed to feel that he had an argument with Retnam but he could not hear clearly what he said. He felt very exhausted and went over to Retnam's table and placed both his hands on Retnam's table. Then he seemed to feel that he had fallen on the ground. He tried to get up. Then he felt something struck his head. After that he became unconscious. After some time he heard someone calling his name. When he opened his eyes he looked upwards and saw trees. Then he seemed to see several persons in uniform around him. He got up and walked. Then he heard three gunshots fired in succession — fired from his righthand side. He heard someone shouting behind him asking him to move. While he was being led forward he saw a police constable whom he happened to know. He asked him: "Apa fasal?" Then he was taken to the Central Police Station, Malacca. About two days later he was taken to the house of magistrate who told him that he had killed such and such a person. He was stupefied.

With regard to the deceased Maniam appellant said that he had no reason to kill him. The deceased Maniam was his superior officer and they were on friendly terms with each other. They were neighbours. Regarding Retnam, they had been fellow officers for more than 3 years prior to the incident. Retnam was his immediate superior officer and he had performed the duties given to him by Retnam satisfactorily and they had been on friendly terms and there was no reason why he should kill him. The deceased Itam used to meet the appellant at the Kuang Heng Bar, Alor Gajah. They used to have drinks together and there was no grudge between them and no misunderstanding and there was no reason why he should kill him.

There are numerous grounds of appeal but we feel that it is sufficient to deal only with some of them, namely the defence of insanity, motive and the presumption of intention. The first ground alleges that the learned judge failed to direct the jury adequately or properly on the question of insanity. The learned trial judge stated in his summing-up that D.W.11, Dr. Wong, the psychiatrist, "works on the assumption that those facts of past brain damage and drunkenness exist. He was not there on the spot. What he works on is by way of assumption." There was evidence that the appellant suffered from concussion during the two motor-cycle accidents

and complained occasionally of headaches. D.W.11 was present during the trial and his opinion was based on the past history of the appellant and the evidence given about the appellant at the trial. D.W.11 has had about ten years experience in the practice of psychiatry and has lectured on this subject at the University of Singapore for six or seven years. He gave his evidence as an expert. In support of his views he quoted passages from:—

(1) *Modern Clinical Psychiatry* by Arthur P. Noyes, M.D. and Lawrence C. Kolb, M.D. (1963) at page 168 on Pathological Intoxication:—

"Occasionally an individual of unstable personality may, on partaking of alcohol, suffer from a transitory mental state much more striking in the nature and severity of the symptoms than ordinary drunkenness, and known as pathological intoxication. The onset is dramatically sudden. Consciousness is impaired, and the patient is confused, disoriented, suffered from illusions, hallucinations of sight, and transitory delusions. Activity is exaggerated, impulsive, and aggressive, even to the point of destructiveness. The emotional disturbances are profound and may consist of rage, anxiety or depression perhaps with suicidal attempt. The disorder lasts from a few minutes to a day or more and is usually followed by a prolonged sleep, after awakening from which there is an amnesia for the episode.

There is an increasing tendency to consider that such episodes with their disturbances of consciousness and perhaps crimes of violence are really instances of psychomotor epilepsy released by alcohol in persons predisposed to such seizures."

(2) *American Handbook of Psychiatry*, Volume 2 (1959) at page 1210 on Alcoholic Pathological Intoxication:—

"Pathological intoxication is one of the more unusual mental disorders due to alcoholism. There exists a peculiar susceptibility to small amounts of alcohol, and the reaction of the patient is frequently explosively violent. Often the amount of alcohol necessary to cause the disorder is only two or three drinks (4 to 6 oz. of whisky or its equivalent). There occurs automatic behaviour which is frequently violent. Assaults upon others may occur. The last in the triad of symptoms is complete amnesia for the episode. The last memory of the patient is that of having taken a drink; his next memory that of wondering where he is and what has happened.

Undoubtedly, there is some pathological physiology of the brain to account for this peculiar circumstances, but the precise location of this area in the brain is unknown. In the writer's experience there is a high correlation between a history of previous brain injury and the later occurrence of pathological intoxication. As yet, we do not know what injured areas of the brain are responsible. It also seems plausible that after a certain amount of alcoholic brain deterioration has occurred, the brain may become sufficiently susceptible to small amounts of alcohol that episodes of pathological intoxication occur."

(3) *Clinical Psychiatry* by Mayer-Gross, Slater and Roth (1960) at page 350 on Pathological Drunkenness:—

"In view of the variability of individual reaction to alcohol, it seems superfluous to single out one type of reaction as 'pathological' or 'complicated'. Nevertheless, a certain type of intoxication, in which the intake of a relatively small amount of alcohol leads to a state of disturbed consciousness with a tendency to extreme violence, has gained some notoriety in forensic psychiatry. These states have been named 'mania a potu', 'pathological' or 'complicated' or 'epilepti-form' (Kraepelin) intoxication.

The history is usually one of some degree of emotional excitement before the drink was taken. Or it may be that the emotional upset occurs in the first stages of drinking, when, for instance, the customary *bonhomie* is interrupted by a dispute. The combination of alcohol with the *disturbed mood state* produces a much greater effect than could be expected from the amount of drink taken, and clarity of consciousness is early and perhaps catastrophically abrogated. The patient becomes anxious and panicky and at the same time wildly aggressive. In one case, a relatively docile and goodhearted young soldier seeing his girl dancing with one of his comrades after refusing to dance with him, drew his gun and fired several shots into the dance-hall, killing two people and wounding several others. He threw his revolver away and ran across the fields escaping into the dark. The police found him several hours later sleeping under a hedge. It was difficult to rouse him, and he later insisted that he had no recollection of the crucial event.

In this case, as in similar ones reported in the literature, there was a history of epileptic manifestations, petit mal, emotional equivalents, and twilight states, preceding the attack itself. It had also been known that the patient was easily upset by small amounts of alcohol. Apart from *epileptics*, certain types of *explosive psychopaths* are predisposed to pathological drunkenness; and intolerance of alcohol and violent behaviour under its influence may also be found with old head injury, chronic alcoholism and other forms of organic disease of the brain, as well as in convalescence from debilitating physical illness."

The learned judge strongly deprecated his opinion in terms which no doubt had an adverse effect on the minds of the jury. D.W.11's evidence was not challenged in any way and he was the only one to give expert evidence. The jury was not so directed.

Again, although motive is not an ingredient in the offence of murder, the jury's attention should have been drawn to the fact that lack of motive was an important indication of insanity and the jury was not told that all the deceased and the appellant were on friendly terms with one another. In *Jusoh* v. *Public Prosecutor*,[1] which in our opinion is on all fours with the present case, Thomson C.J. (as he then was) stated *inter alia*:—

"At no time did he point out that there was a complete lack of any evidence of any motive for the killings, that three of the dead people including a baby at the breast, were members of a family in which he had been living as a member on terms of complete amity."

He then went on to say:—

"He did not remind them that the medical witness had had considerable experience in connection with diseases of the mind.

. . . . . .

It is, of course, well settled that the question of whether the defence of insanity is made out or not is a question for the jury (see, for example, *Rivett* [2]) though we know of no case, neither have we read of one, where the only medical evidence has been in favour of insanity and where a jury has been virtually invited to find

against insanity on the facts of the case. Generally there is medical evidence on both sides and the jury have to decide on a consideration of the evidence as a whole which body of medical evidence they will accept."

The learned judge in his summing-up in reference to drunkenness said as follows:—

"You have to decide whether he was so drunk as not to be able to form that specific intent to constitute the crime of murder. You have also to bear in mind that Ah Toong Peh has not given evidence because in this connection it is vital to know how much brandy Ah Toong Peh poured into the accused's glass."

With respect, we think that the natural effect of a direction in these terms must lead the jury to conclude that the most cogent evidence of drunkness which the defence could and should have produced had not been produced, although available. The jury could accordingly draw their own inference from the failure to produce such evidence. In our opinion this was a misdirection of fact because there was abundant evidence *aliunde* of heavy intake of strong intoxicants by the appellant at the relevant time.

The jury was also told:—

"If any of you have the slightest idea that you could possibly draw from such an inference, I must remind you of a case which was tried by my brother Gill in Raub where a police constable shot three persons with a service rifle and of another case tried by my brother Ismail Khan at Seremban where a kampong dweller in Kuala Pilah killed three persons at almost the same time. In none of those cases was insanity ever suggested."

In the Raub case the accused had first killed an unfortunate creditor in cold blood and then the man's two other brothers, while in the Seremban case the triple murders had taken place in the course of an armed robbery. Those cases were clearly irrelevant, but nevertheless were held out to the jury as authority for the proposition that multiple murders were by no means relevant facts from which any inference of insanity could be drawn. To have withdrawn such a material and cogent fact from the consideration of the jury was a serious misdirection which in our view could not have failed to influence their verdict to the appellant's prejudice. It was decided in *Hurpurshad* v. *Sheo Dyal* [3] and in *Loh Moh* v. *Public Prosecutor* [4] that a judge could not, without giving evidence as a witness, import into a case his own knowledge of particular facts.

Another criticism of the summing-up concerned the manner in which the trial judge dealt with the presumption that every man intends the natural and probable consequences of his act. He repeated it several times in his summing-up. It was decided in the case of *Director of Public Prosecutions* v. *Smith* [5] by House of Lords that:—

"Though the presumption that a man intends the natural and probable consequences of his acts is applicable to the above circumstances and, once the prisoner's knowledge of the circumstances and the nature of his acts has been ascertained, can be rebutted only by proof of incapacity to form an intent, i.e., insanity or diminished responsibility, any reference to such presumption is best omitted from a summing-up on a charge of murder, and the test of the ordinary reasonable man, which contains all the necessary ingredients of malice aforethought, is a simpler criterion."

This decision, however, was subjected to adverse comments in *Glanville Williams'* Criminal Law (2nd Edition) at page 89, paragraph 35:—

"It is often said that a man is presumed to intend the natural consequences of his acts. This *maxim*, though many judges have been fond of it, contains a serious threat to any rational theory of intention. It is not true in fact that a man necessarily intends the natural consequences of his acts: and it is not true in law that he is compellingly presumed to do so."

And at page 93 it went on to say:—

"The other crime adversely influenced by the *maxim* is the gravest in the ordinary criminal calendar: murder. This has not happened in other parts of the Commonwealth, where the *maxim* is as discredited for murder as it is for other crimes. In Australia, it is held that when a person is charged with murder on the ground that he intended to kill or to inflict grievous bodily harm, a real intent must be proved. This view is also taken in Canada, at least where evidence of drunkenness is given, and probably in other cases as well. Canadian courts frown upon a direction to the jury in terms of a presumption of intent. Instead of using this *maxim*, the jury should be told that they are entitled to draw inferences as to the defendant's intention from what he did, but that if they have a reasonable doubt as to his intention they must find for the defendant."

In *Parker* v. *The Queen* [6] Dixon C.J. has this to say:—

"In *Stapleton* v. *The Queen* [7] we said: 'The introduction of the *maxim* or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous'. That was some years before the decision in *Director of Public Prosecutions* v. *Smith*, which seems only too unfortunately to confirm the observation."

In view of the above observations we are of opinion that judges in this country should avoid using this *maxim* in their summings-up to the jury when dealing with the question of intention in murder trials.

Now we come to the charges. With regard to the second charge it was not disputed that there was ample evidence that the appellant did kill the deceased. The trial judge's summing-up was fair and there was no miscarriage of justice. Regarding the other two charges we did not think that there was sufficient evidence to convict the appellant on charges of murder. However, as from the record of the proceedings there was evidence of insanity and, in our opinion, had the jury been properly directed they would have came to a different verdict, we had no alternative but to allow the appeal and set aside the convictions on the three charges and the sentence on the first charge. As it was our view that the appellant was insane at the time he committed the act, we made an order that he be kept in safe custody in Kuala Lumpur jail pending the order of the Governor.

In conclusion we would refer to a comment made by learned counsel for the appellant during the trial and repeated in this court that the crime could have been avoided if the police had restrained the appellant from going out of the investigating officer's office after the interview. In fairness to the officer concerned, whose conduct was criticised, we must say that, in our view, he could no more have foreseen the tragedy than any of the unfortunate victims themselves. Hence no blame should attach to him for having failed to anticipate what nobody else could possibly have foreseen.

Appeal allowed.

Solicitors: *Kamala Devi & Co.*

GURBACHAN SINGH v. SHARIKAT BAKTI LTD.

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and Raja Azlan Shah J.) January 9, 1967]

[K.L. — Federal Court Civil Appeal No. X.43 of 1966]

Practice and Procedure — R.S.C., O. 14 — Appeal against order giving leave to sign judgment — Question of fact and law.

This is an appeal against the order of the High Court ([1966] 2 M.L.J. 269) giving leave that judgment be summarily entered against the defendant, appellant herein, under R.S.C., Order 14.

Held: as one of the questions which had to be decided involved a substantial question of fact and law, the appellant, should be given leave to defend.

FEDERAL COURT.

Chan Siew Yoon for the appellant.

L. P. Thean for the respondents.

Azmi C.J. (Malaya): This is an appeal against the order of Gill J. giving leave that judgment be summarily entered against the defendant under Order 14 of the Rules of the Supreme Court.

The facts may be summarised as follows:—

The plaintiffs are the registered owners of the land in question and in their statement of claim they alleged that the defendant is a trespasser on the said land or more particularly that part with a building known as No. 86A and 87 Jalan Ipoh, Kuala Lumpur.

In the alternative the plaintiffs also allege that the defendant was at all material times a bare licensee of the said part of the land which licence was determined by the notice of the 10th January 1966. The plaintiffs then claim for:—

(a) a declaration that the defendant is a trespasser on the said land,

(b) an injunction restraining the defendant, his agents or servant from collecting any rents or profits from the occupants of the said land or otherwise interfering with the plaintiffs' enjoyment of the said land,

(c) that the defendant do deliver to the plaintiffs vacant possession of the said land and

(d) damages.

The plaintiffs served on the defendant the notice dated 10th January 1966 requesting the defendant to cease trespassing upon the said land.

The writ with the statement of claim was served on the defendant on 15th April 1966. On the 10th May 1966, the plaintiffs applied for liberty to sign final judgment in the action.

On the 13th May 1966 the defendant filed his defence, denying that he was a trespasser or that he was a bare licensee of the said land. The defence went on to say that the defendant has been a lawful tenant of the said land since 1954 by paying ground rent to one Junid bin Amin who at all times was acting as agent of the administrators of the estate of Jamiah binte Haji Abdul Rahman, the previous proprietress of the land. It also said that the buildings on the land were erected by the defendant as lawful tenant and further or in the alternative even assuming that the said Junid bin Amin had acted without authority of the administrators of the said estate the said administrators of the estate should have given the defendant notice of the lack of authority on the part of the said Junid bin Amin and by remaining silent for over a period of ten years, the administrators were estopped from denying that the defendant was the lawful tenant of the said land and the plaintiffs as purchasers of the said premises can be in no better position.

In support of the application for summary judgment Mohamed Salleh, the manager of the plaintiff company affirmed in an affidavit made on the 10th May 1966 that the plaintiff company purchased the said land on the 25th November 1965 from the administrators of the estate of Jamiah binte Haji Abdul Rahman, who had prior to the sale been the registered proprietress of the land and also the fact that on the 10th January 1966 the plaintiffs served on the defendant notice requesting the defendant to cease trespassing on the said land and requiring him to vacate the same.

Apparently when notice to quit was served on the defendant on the 10th January 1966 the defendant on the 31st of that month alleged that one Junid had collected rent from him on the 31st December 1965 being rent for the year 1966. In reference to this Mohamed Salleh replied that the said Junid bin Amin was never at any time the registered proprietor of the said land nor had he at any time any right, title, interest or power to confer any right, title, or interest in the said land or any part thereof and in consequence Mohamed Salleh went on to say there was no defence in the action save as to the amount of damages.